Of Municipal Law.

Chapter I

Law, in the most comprehensive sense of ye term, is "a rule of action," prescribed by some superior, & wh. ye inferior, or subject of it, is bound to obey (1 Black. Com. 38.

~~In this general acceptation of the word, term, it is~~
~~The "rule," thus prescribed, is, in this general acceptation of it predicable of all kinds of action, whether intellectual, moral, or physical, animate, or inanimate (Id.); and in ye same extensive sense~~

In this general ~~acc~~ acceptation of ye term, Law is predicable of all kinds of action, ~~whether~~ intellectual, ~~or~~ moral, & physical, animate, & inanimate; and in this sense of ye word, ~~thus~~ all the departments of external nature, as well as all intelligent and accountable creatures, ~~beings~~ are subject to laws, or rules of action, ~~(Id.) ordained by their Creator (Id.)~~, ordained by the Author of nature (Id.), & denominated Laws of Nature.

~~By the Law of Nature, as (applicable to) considered as a rule of human action, or conduct,~~

But by ye Law of Nature, considered in a limited sense, and merely as a rule of human action, or conduct, ~~is~~ is meant ye unrevealed will ~~law~~ of God ~~or that the moral law, is discovered by human reason (Id. 39)~~ in ye government of ye moral world, or in other words, the moral law, as discovered by human reason (Id. 39).

The Law of Nations is the law, wh. subsists between nations, or sovereign states (Vattel, L. N. Prelim. s. 3); and consists, 1. of the law of nature, or the principles of natural justice, & right reason, as applied to nations, in their conduct towards each other; and 2. of such ~~regulations, as were~~ conventional rules, as have been

...ome legal effect

established between them, either by ye sanction of express compact, or by such a general, & long-continued usage, as supposes an implied one (Id. s.s. 5. 6. 9. 24. 25; 1 Black. Com. 43. 4 Id. 66. 67).

Natural law, (so far, at least, as it forms a part of ye law of nations), being founded on principles of right reason, wh are universal, & immutable, is obligatory upon all nations, at all times, ~~(& is recognised as such, by all civilized states (Vattel Prelim. s. 8)~~ and consequently, no individual state, or people, can rightfully enact any law, repugnant to it (Vatt. L. N. Prelim. s. 8

Municipal Law, wh is the principal & more immediate subject of inquiry, is defined to be "a rule of civil conduct, prescribed by ye supreme power in a state, commanding what is right, and prohibiting what is wrong." (1 Black. Com. 44).

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(1) The concluding words, "commanding what is right" &c. are not an essential part of ye definition; and, as applied to an unjust, or unwise law, are, in fact, untrue. But in legal theory, & as contemplated by those, who officially administer ye law, every rule, prescribed by ye supreme power in a state, & wh is not repugnant to ye fundamental law, or constitution, of ye state, is considered as just & wise, so long as it continues in force (1 Black. Com. 91.

~~(1) The latter words, "commanding what is right" &c. are not an essential part of ye definition: Indeed, as applied to an unjust, or an unwise rule, (they are not true) these words are in point of fact untrue. In theory, however, they may, perhaps, be predicated of all laws,~~

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Municipal law, then, is ye law of any particular state; and is, to the individuals, who are subject to it, what the universal law of nations is to nations, or states, considered as individuals, or moral persons, in relation to each other (Vatt. L. N. Prelim. s. 4).

The municipal law of each sovereign state is obligatory not only upon its own native citizens, or subjects; but also, upon all such *strangers*, or *aliens*, as are, for ye time being, within its juridical limits, and under its protection. (7 Co. 6. 1 Black. Com. 370. Co. Litt. 129.a. Vatt. L. N. b. 2. c. 8. s. 101. 102. 107. 108). For all persons, entering into ye territories of a state not their own, ~~[illegible]~~ owe it a local & temporary allegiance, as ye tacit condition of ~~his~~ their being permitted to enter it; wh allegiance, & their consequent obligation to obey ye laws of ye state, ~~continue~~ continue only while they remain within its territories ~~[illegible]~~ (2).

The *local* municipal law of any particular state is, to all other states, a *foreign* law; but ye law of nations, being obligatory upon all nations, & recognised, as ~~a rule of conduct~~ of universal obligation, by all civilized states, ~~forms~~ is a constituent part of ye law of every such state; and cannot therefore, be regarded as a *foreign* law in any part of ye civilized world (4 Bla. Com. 67).

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(2) From this duty of local allegiance, however, foreign *ambassadors*, & ~~public~~ ministers, (~~or representatives~~) being considered as representatives of ye sovereigns, by whom they are commissioned, are exempt. They are, therefore, not amenable to the municipal laws of the state to which they are sent. (Vatt. L. N. b. IV. c. 7. §§. 81. 92. 1 Black. Com. 253.)

~~[illegible] fundamental, or constitutional laws of ye state) [illegible] make. For [illegible] such [illegible] are in their legal theory [illegible] to those who [illegible] considered as [illegible] time in [illegible].~~

[illegible] loyal [illegible]

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~~(in ye inception of)~~ In explaining ye general nature, & elementary principles, of municipal law, as introductory to a more ~~full~~ particular view of ye subject, I shall follow, substantially, ye outline of "the Nature of Laws in general," presented by Sir William Blackstone, in the Introduction to his invaluable Commentaries on the Laws of England; ~~and~~ and shall, therefore, on this part of the Title, attempt little else than an epitome of so much of the second and third preliminary Sections of those Commentaries as appears most important to the student of American law.

In ye first place, then, Municipal Law, ~~[illegible]~~ according to ye definition, already given of it, is a rule: not a special, transient order, ~~(command)~~ injunction, or precept, to be complied with, on some special occasion, ~~&~~ and on being fulfilled, to cease; but a regulation + "permanent, uniform, and universal" (1 Black. Com. 44). But, by ye quality of permanency, ~~it~~ can not be meant that ye rule must be perpetual; (for temporary laws are sometimes enacted); but, ~~and~~ that it must be ~~(provided, either without limitation of time)~~ either unlimited in point of duration, or restricted to some determinate prefixed period of time; and not such a mere transient order, as is described above. And therefore, an act of the legislature, authorizing ~~[illegible]~~ a sale of ye lands of A.B. an infant, does not correspond to ye ~~[illegible]~~ correct notion of a municipal law: For ye whole force of ye act is exhausted upon A.B. and does not concern the state, or even any class of ye community. It is, therefore, rather a sentence, or decree, than a law. ~~in ye nature of an exception to ye rule, wh. constitutes~~

+ wh., in ye words of ye same learned commentator, is

[illegible]

Again: The proposition, that the rule, wh. constitutes a municipal law, ~~is~~ must be "uniform, & universal," cannot be understood to mean, that every such ~~law~~ rule must operate, throughout ye whole realm, or state, (for local usages, & legislative enactments, ~~extending~~ confined, in their operation, to particular districts of a state, may have ye full force, & essential character, of laws) (1 Bla. Com. 74); but merely, that it be general, and not personal, within ~~its own~~ the limits of its own operation.

Municipal law is, also, a ~~code~~ rule, as distinguished from a compact. The latter is ye act of ye party, whom it binds; and ye obligation, wh. it imposes upon him, is created, by his own voluntary assent: whereas ye rule, # of wh. we are treating, is prescribed by a superior to an inferior; and ye obligation, created by it, ~~is founded in ye duty of obedience~~ flows from ye duty of obedience (Id. 44).

II. Municipal Law ~~It~~ is, moreover, a rule of civil conduct; and is, as such distinguished from natural law, wh. is a rule of moral conduct. The latter regards man, (~~as a rational & moral and accountable subject, member of human society, or a state of nature, & independently of ye laws & institutions of human government~~) as a rational & accountable agent, considered as a member of human society, & independently of ye laws & institutions of human, or civil, government: The former regards him as a member of civil society, or a subject of civil

government; and superadds to yᵉ duties, enjoined by natural law, others, wh. result from the condition, and relations of civil society.

The municipal law does not, however, attempt, or profess, to enforce all yᵉ moral duties, enjoined by natural law; but in general, limits its requirements to those, wh. are called duties "of perfect obligation" (3 T. Rep. 63-4) – leaving yᵉ observance of what are termed duties "of imperfect obligation," (such as benevolence, gratitude, charity &c), to be enforced, by yᵉ dictates of natural conscience, or yᵉ moral sense of individuals (3).

III. It is also essential, according to yᵉ definition, before given, of municipal law, that yᵉ rule, which constitutes yᵉ law, be "prescribed"; or in other words, that it be promulgated, before it goes into operation: (1 Bla. com. 45-6): + or, that the transactions of the subjects, or citizens, of a state should be made legal, or illegal, valid, or void, by an enactment,

+ Since it would be manifestly unreasonable, to require obedience to a rule, before it has been made known;

(3) Duties of perfect obligation are those, wh. yᵉ observance may be exacted, by constraint or coercion – as yᵉ duties of private & public justice (Vatt. L. N. Prelim. s. 17): Duties of imperfect obligation, (as those specified in yᵉ text) are such, as are enforced by no other sanction than that of moral influence, or a sense of moral right, acting upon the human will.

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not promulgated, ~~not in existence~~, when y^e transactions, themselves, took place. ~~(As that a contract, conforming, in all respects, to y^e laws, existing when it was made, should be rendered void, by a rule, afterwards ordained; or (what would be still more unjust) that an act, not forbidden, at y^e time when it was done, should be declared illegal, & made punishable, by a subsequent enactment. Laws of this latter kind are indeed, universally considered, as arbitrary & tyrannical, & consequently, as repugnant to y^e fundamental principles of justice, & of criminal jurisprudence.)~~ Hence it has become usual, both in England & in this country, on y^e enactment of a new law, to name a certain future day, from & after wh. it shall take effect.

these

Under y^e present head, it is proper to take notice of what are called retroactive laws; ~~(by which) i.e. laws (not only promulgated, but enacted, subsequently to the transactions)~~ i.e. laws intended to control transactions, wh. took place, or rights, wh. existed, before y^e law itself was promulgated, or enacted.

of general. For all retroactive laws are not ex post facto

~~(Under y^e present head, it is proper, also, to take notice of y^e whole class of retroactive laws; by wh. I mean laws, not only promulgated, but enacted, after y^e transactions, wh. intended to affect.)~~

Any law, penal, or remedial, wh. subjects pre-existing rights, or past transactions of any kind, to a rule not before applicable to them, is, essentially, a retroactive law. Of this kind is any enactment, making void, or discharging, a prior contract, wh. was originally valid, or impairing a previously-vested right, of any sort. In this general class are also comprehended what are termed ex-post-facto laws: For all laws, falling under this last denomination, are retroactive, in their operation.

Marginal notes: ~~or~~ be otherwise ~~stated~~, in its ~~ef~~fect. — + they are — lines, the law ... laws

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~~Post alt retroactive laws are not ex post facto~~

But all retroactive enactments laws are not termed ex post facto laws. For an ex post facto law is a retroactive penal law (1 Black. Com. 45. 3 Dall. 385. 391); ~~is~~ a law, subjecting any one to punishment, for an act or omission, wh took place, before the law itself existed (was made). And in this sense, only, is ye term, "ex post facto law", ~~employed in ye text~~ understood, & expounded, in the judicial tribunals of ~~this~~ our country (3 Dall. ub. sup.).

Retroactive laws, then, may be said to constitute a genus, of wh ex post facto laws are a species. The latter, however, are, in all enlightened nations, regarded with general odium, as being criminally arbitrary, tyrannical, and repugnant to ye plainest fundamental principles of ~~the~~ criminal jurisprudence. For there can be no crime, where no law is violated; and it is self-evident that no law can be violated, before it exists.

The constitution of the United States (art. I. s. 10), has therefore expressly restrained ye legislatures of the several States, in the American Union, from passing "any ex post facto law"; and consequently ~~therefore~~ any legislative ~~law~~ enactment,

contravening this restriction, is unconstitutional, & void. By ye same article, ye several State-legislatures are forbidden to pass "any bill of attainder" ~~(the penalties of ye forfeited character of an ex post facto law and of a judgment, or sentence, pronounced in pursuance of it 4 Black. Com. 259)~~ — a proceeding, wch involves the exercise of both legislative & judicial powers: since such a bill partakes of the twofold character of an ex post facto law, and of a penal sentence, or judgment, in pursuance of it 4 Black. Com. 259.

(see p. 13. top) The same article, in ye constitution of the United States (s. 10), forbids the legislatures of the several States to pass any law, "impairing the obligation of contracts." In the construction of this prohibitory clause it has been determined, & is considered, as fully settled, by the Supreme Court of the United States, that a law of any State, exempting the person of an insolvent debtor from imprisonment for his debt, on the surrender of his property, for the benefit of his creditors, is not within the prohibition, & is therefore constitutional & valid: Because such an enactment affects only the extent of the remedy, or mode of enforcing the contract, without impairing its obligation. For the debt or duty, created by the contract, remains unsatisfied by the law; and the debtor's property, which alone, constitutes the means of satisfaction, continues liable to the claims of his creditors, to the same extent as before the law was passed.

4 Wheat. 122. 209.
6 Id. 131.

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But an act of any state-legislature, which purports to discharge an insolvent debtor, (on a surrender of his ~~their~~ property, as in the last section), from all his debts, contracted previously to his discharge — or in other words, which purports to ~~[illegible]~~ exempt as well ~~their~~ his future acquisition ~~of property~~, as ~~their~~ his person from all liability for such debts — is + within the above prohibition, & consequently void, as being unconstitutional (4 Wheat. 122. 209. 6 Id. 131. 12 Id. 213. 3 Cown. R. 253. 334. 472). For as such a law places all means of ~~[illegible]~~ satisfying the debtor's contracts, out of the reach of his creditors; it virtually "impairs the obligation" of his contracts. And the rule ~~[illegible]~~ extends as well to suits, brought in a court of the same state, in which the act was passed, the contract made, & the discharge ~~was~~ obtained, and between parties, who were both citizens of that ~~same~~ state, as to ~~such~~ suits, brought by citizens of a different state, & in a court of a different state (6 Wheat. 131).

+ (so far as it attempts to exempt the future property of the debtor),

But in a case, subsequent to those referred to in the last section, it has been resolved, by the Supreme court of the United States — though by a strong division of opinion (4) — that an insolvent law of any state, ~~disch~~ discharging not only the debtor's person, but his future acquisitions of property, is not a law "impairing the

(4) By ~~the~~ four judges against three. Whether this determination

obligation of contracts," so far as regards debts, contracted after the passage of the law (12 Wheat. 213):

But it was also determined, in the same case, by a similar division in the opinions of the judges, that a discharge of a debt under such a law, is no bar to an action, brought by a citizen of another state, in the courts of the United States, or of any other state than that, in which the discharge was obtained. This decision appears to have proceeded chiefly, on the ground, that a contract, made in a state, in which such a statute exists, at the time of the making of the contract, must be deemed to have been made, in contemplation of the statute, and with a tacit understanding, that the obligation, created by the contract, was liable to be qualified, or discharged, by the operation of the statute: So that, according to this reasoning, the contract is deemed to have been made, subject to that operation, by the mutual consent, or understanding, of the parties.

But it was also determined in the same case, by a similar division in the opinion of the judges, that the discharge of a debt, under such a law, in any state, is no bar to an action, brought by a citizen

will ultimately prevail, the law of the land, is perhaps, somewhat doubtful.

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of a different State, ~~either~~ in any of the national courts, or in a court of any other State than that, in which the discharge was obtained (12 Wheat. 213).

But it was also determined, in the same case, by a similar division in the opinions of the judges, that the discharge of a debt, under such a state-law, is no bar to an action, brought by a citizen of another State, in any of the national courts, or in the courts of any other State than that, in wh. the discharge was obtained (12 Wheat. 213). This limitation of the principle, stated in ye last section, would seem to have been suggested by ye consideration, that as ye law of any particular State has no extra-territorial authority, this law of New York ought not to affect ye rights of creditors, who are citizens of any other State. than that, in wh. it was enacted (5).

(5) It, however, a law of the kind, here supposed, acts not merely upon the creditor's remedy, but upon the duty, or obligation, created by the contract, it is not it may possibly be. The reason is not very obvious, why the different rules of decision should prevail in different courts, or between different classes of creditors.

But retroactive laws, not penal, are no ~~further~~ otherwise restrained, by y^e constitution of y^e United States, than by y^e prohibition, w^h has now been mentioned. (v. p. 3). Such laws are not, therefore, as a class of laws, forbidden, by that instrument; since it contains no provision in restraint of retroactive laws, in general. Nor are laws of this kind forbidden,+ by y^e local constitutions of y^e several States of y^e American Union, ~~with y^e exception~~

+ except in y^e State of New Hampshire,

Such laws are, however, in y^e theory of elementary jurisprudence, deemed hardly consistent with y^e just & liberal principle, that every law should be "prescribed." (1 Black Comm. 46. 8 Co. 118. Bac. Abr Stat. C. 2 Mod. 310. 16 Mass. R. 245. 2 Inst. 292. 16 Mass. R. 245.) But this theoretical principle is ~~by no means~~ far from being universally observed, in ~~(the practical legislation)~~ practical legislation; and there is, perhaps, no legislature, w^h does not occasionally find laws of this kind to be necessary, on grounds both of public expediency, & of private justice. Hence, statutes of this class are to be found, among y^e acts of most, or all, legislatures; & have, generally, been approved of, & sanctioned, by y^e proper tribunals (Doug. 661. n. 3 Dall. 386. 395. 4 Conn. R. 209. 222. 6 Id. 54. 190. 197. 16 Mass. R. 257–261.

~~As, however, such laws must, generally, disturb, in some degree, pre-existing vested rights,~~

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Still, as laws of this kind must in some degree interfere with pre-existing vested rights, it seems to be generally agreed, that they ought not to be enacted except in exigencies, where very manifestly demanded them; but that when they are clearly conducive to the public good, & conformable to the principles of private justice, or natural equity, legislatures are justified in making, & courts of justice bound to enforce them (Six).

There will, indeed, generally occur, in the affairs of perhaps every state, various conjunctures, which seem clearly to demand such laws, on grounds both of public utility, & private justice. But the principal & most usual occasion for enactments of this kind occurs, when by reason of a general mis-construction of some existing law, or in consequence of a long & constant common practice under it, some inconvenient defect in the law itself — rights, or interests, supposed to have become established under it, are found not to be consummated; and thus the ends, proposed by the law, have not been attained. In such case, it often becomes the further interposition of the legislature, if not necessary, to confirm, or consummate, what the defective provision of the original law, or the erroneous practice under it, have left void, or incomplete. Various acts of this kind are to be found, both among the statutes of the United States, & of the individual states of the Union.

Insert at # p. 15.

In many instances, statutes, not prospectively, or intentionally retroactive, have become so, in fact, from the rule, formerly adopted in the English courts, that every legislative enactment, not expressly prescribing the time, from which it should take effect, should go into operation from the first day of that session of Parliament, in which it was passed. (12 Geo. 91. Plowd. 79. 4 T. Rep. 660. 6 Bro. P.C. 553. Bac. Abr. State C.) This rule, ~~formed altogether, in addition to the~~ founded upon the fiction, that there are in a session of the legislature, as in the term of a court, no fractional parts of time, & that the ~~whole~~ entire period of the session is a punctum stans, or indivisible point, fixed at the commencement of the session, must frequently have given to the laws a retroactive operation to laws, not intended so to operate. For a law, enacted in a late stage of the session, but taking effect, by relation, from its commencement, would, in many cases, overreach & affect all intermediate transactions, falling within its purview.

But the evil effects of this fiction, having, at length, attracted the attention of the British Parliament, the rule was abolished, in England, by the statute 33 Geo. 3. c. 13; by which it is provided, that statutes, ~~not prescribing the time~~ appointing no ~~expressly~~ time, for the commencement of their operation, shall take effect, from the time, at which they receive the royal assent.

Before this act was passed, it had been once determined, that if two statutes, enacted during one of the same session of Parliament, were found to be inconsistent, ~~each other~~ that both of them could not take effect together, ~~each of~~ they mutually neutralized, or repealed, each other, to the extent of their repugnancy, (Bac. Abr. Stat. C.). And this decision appears to be a legitimate consequence of the ~~former~~ original rule, strictly applied: For according to the fiction, on which that rule was founded, both statutes must have been enacted, on the same day, & even at the same moment; & consequently, no priority could be assigned to either of them. It was, afterwards, resolved, however, that in such a case, the actual day, on which each of the two acts ~~was~~ was passed, might be shown, by proof; & that the one, which was, in fact, the latter in point of time, should repeal the other, so far as they were repugnant to each other. (6 Mod. 287. Bac. Abr. Stat. D.)

In the United States, it seems, that no precise rule has been laid down, as to the time of a statute's taking effect, when no time is appointed, in the act itself. But it has ~~lately~~ been lately resolved, by the Supreme Court of the U. S. that, in such case, the act takes effect from its date. (7 Wheat. 164. & vid. 1 Gallison, 62. 7 Johns. 477.): ~~A rule, still liable to objection~~ This rule seems also liable to objection; for until the publication of a law, at least, the subjects of it cannot, generally, be presumed to know of its existence; & a considerable time may elapse, between its date & publication.

In the State of Connecticut, a rule, somewhat more free from exception, has been established, by the Legislature: For, in the year, 1821, it was enacted, in that state, that all public statutes shall take effect, from the close of that session of the Legislature, in which they are passed — unless otherwise directed, by such statutes. (Stat. Conn. Tit. 1, §258. 53)

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~~But, as retrospective statutes are, generally, the worst species of laws, not to be favored with favour, it seems to be~~

~~That~~ ~~as~~ however retroactive statutes, ~~though not~~ even when not penal, are not regarded with favour, except when they appear to have been demanded, by ye dictates of manifest expediency, & probable equity; it appears, now, to be an established doctrine, that no statute should be so construed, as to operate retroactively, unless ye intention of ye legislature, that it should so operate, is ~~manifestly and plainly~~ clearly expressed; or in other words, that a retroactive effect should ~~never~~ not be given to any statute, by mere construction (2 Mass. R. 143. 146. 8 Pet. 423. 427. 4 Conn. R. 209. 225. 7 Johns. R. 506. 1 Bay 179)

2 Show. 17. 4 Burr. 60. 2 Bouvier, 272.

But, subject to ye restrictions & cautions, wh have been suggested, such statutes, it is believed, are, at this day, generally deemed constitutional & valid.

[Insert here p.p. 15.a. 15.b]

But the inconveniences of these penal rules is, now, in a great measure, obviated, by the frequent practice of prefixing, in public statutes, some certain future day, from which their effect shall commence: A practice, which has become usual, ~~both~~ in the acts of Congress, & of the several state Legislatures.

By what authority prescribed.

The authority, or power, by wh municipal laws are "prescribed", or enacted, is ye supreme power in ye State; & this is, in all cases, ye legislative power (1 Black. Com. 46). The power of making laws, for a ~~an~~ sovereign state being, in its nature, ~~ye highest power~~ sovereign power, ~~of the state~~, to wh all other civil powers, in ye State, are inferior. The legislative ~~power~~ is, therefore, ye highest power, that is exercised, or known, ~~can be known~~, in ye functions of civil government. For ye power of expounding, & that of executing, ye laws, are exercised only in obedience to ye Law, as

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as prescribed, by yt. legislature (3)

~~All regular civil government can probably be traced to~~

(3) In all regular civil government there are, essentially, (whether so designated, in express terms, or not,) three distinct constituent powers: viz. 1. the legislative, or yt. power of making laws; 2. the judicial, wh. is yt power of expounding & applying them; and 3. the executive, or yt. power of putting them into execution. And even where — as in some arbitrary governments — these three are all lodged in one & yt. same body of men, or even in a single individual, yt exercise of them is, still, yt exercise of three distinct powers, or functions, of government. — In ~~all~~ yt formation of all ~~modern~~ in modern times, free constitutional systems of government, it is deemed of yt utmost importance to yt preservation of civil liberty, that these three powers be preserved, as far as possible distinct from each other; & that yt depositaries of any one of them should as little as may be share, in yt exercise of either of yt other two. But there is, still, perhaps no existing ~~civil~~ constitution of civil government, in wh ~~those powers are kept entirely separate~~ it has been found practicable & expedient, to keep these yt exercise of these powers entirely separate from each other.

~~Some of yt executive functions of civil government are, by a more specific designation, termed ministerial; others are called, simply, executive~~

The general power of making laws necessarily implies that of altering & repealing, such as already exist. (Bac. Ab. Stat. D.) For sovereign power, though wielded, at different times, by different hands, is still yt same, at all times; and to restrain, in any degree, its right to alter, or abrogate, existing laws, ~~yt exercise of its legislative functions~~ would be to impair, in yt same degree, its essential supremacy, or power of making laws. The legislative power

may, indeed, be restrained, by ye fundamental, or constitutional, law of ye State, wch are paramount, in authority, to all acts of ordinary legislation; but in ye absence of such a restraint, ye ~~legislature~~ legislative power is, ~~unlimited~~ in its nature, unlimited.

From ye concluding words of ye definition of municipal law — "commanding what is right, & prohibiting what is wrong" — it is not to be understood, that every thing, commanded by legislative enactment, is in point of fact, "right," & that whatever such enactment prohibits, is, ~~indictably~~ actually, & uniformly, "wrong": For ~~many~~ unwise & unjust laws unquestionably may be, & have been enacted. ~~The true construction, then, of~~ This concluding clause of ye definition, then, means, merely, that all constitutional enactments are, in legal theory, just & right, & to be observed & enforced, as such, while they continue ~~unrepealed~~ in force, i.e. until ~~they are repealed~~ while they remain unrepealed.

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Of the Interpretation of Laws.

The interpretation, or construction, of a law is that process of ye mind, by wh ye ~~meaning, or~~ intention, of ye lawgiver, as expressed in it, ~~in enacting it~~, is ascertained. ~~(For ye expressed will of ye lawgiver, or legislature, constitutes ye law)~~ And in all well-balanced governments, in wh ye three great departments of ye civil power ~~(of ye state)~~ are separated from each other, by well defined boundaries, ye authoritative construction of ye laws of ye state is ye appropriate province of its courts of justice: ~~The judges of these tribunals~~ These tribunals (especially those of ye superior class), being considered as ye "oracles" of ye law ~~of ye state~~.

~~In searching for ye true meaning of a law, ye inquirer is at liberty to consult~~

In attempting ye construction of a law, ~~ye in-struction, in whole, or in part~~ or of any of its parts, ye inquirer is, in ye first place, to consult ye language, in wh it is expressed; and if any doubt exists, in regard to its true & precise meaning, he is ~~then~~ at liberty to advert to ye context, ye subject-matter, ye effects & consequences of ~~one & another~~ different interpretations, & finally, ye apparent reason, & spirit of ye law. (1 Black. Com. 59).

Hence result ye five following Rules of interpretation, by ye judicious application ~~(of some or all)~~ of wh, or some of wh (as ye exigency of ye case may appear to require), ye true

~~content~~ intention of ye legislature can scarcely fail to be discovered:

1. The words of the law are generally to be understood ~~in their~~ according to their most known, usual, ~~& popular~~ signification; but terms of art, or technical terms, are to be taken, according to their acceptation, among the learned in the art. Hence, when any term, to which the common law has assigned a technical, or appropriate meaning is introduced, in an act of the legislature, the term is to be understood, in the sense, annexed to it, by the common law. (1 Black. Com. 59: Bac. Abr. Stat. I.4).

2. If, after the application of the above rule the meaning of the law is still doubtful — as, especially, when a word, phrase, or sentence, is ambiguous, or equivocal; its true import may frequently be ascertained, by comparing it with the context (1 Black. Com. 59). For it often happens, that a ~~[illegible]~~ word, or passage, which, detached, & taken by itself, appears to ~~require~~ bear one particular construction, is, found, by its connexion with what precedes, or follows it, ~~satisfactorily found~~ manifestly to require a different interpretation. [~~Noscitur a sociis, is an established maxim, in the interpretation of language, used in forming a judgement of individual character judging of the character of men~~] The familiar axiom, noscitur a sociis, is as usefully employed, in the interpretation of ~~in expounding~~ laws, & of language, generally, as in judging of the individual characters of men. For the same purpose, the preamble of the law, & other laws, relating to the same subject, may sometimes be usefully consulted (Id.).

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3. The words of every law are to be understood, as having reference to its subject-matter (1 Blackst. Com. 59): For that is presumed to be in the immediate contemplation of the Legislature, & the language, employed by him, in any given act, is supposed to be directed to it. As one & the same word, or passage, may bear very different meanings, when used with reference to different subjects; a knowledge of the particular subject of the law in ~~question~~ question, will generally afford the best criterion, for determining the true meaning, or application, of such word, or passage

4. The effects & consequences of ~~two or more~~ different constructions, are to be regarded. In short, one ~~construction would~~ of two possible constructions would lead to a result, manifestly unjust, absurd, or unreasonable & another, to a just & rational consequence; the latter is to be ~~adopted~~ adopted, & the former rejected (2 Mod. 344).

~~For the illustration of the foregoing rules by examples~~

For examples, illustrative of the foregoing rules, the reader is referred to the Commentaries of Sir William Blackstone, as above cited. A work, presumed to be in the hands of every student of the law.

5. The last & most important rule for the interpretation of a law, — especially a remedial one — of which the language is dubious, is, that its reason & spirit be consulted: ~~And this is done, by ascertaining the cause, or object, of its enactment.~~ (1 Black. Com. 60. 4 Bac. Ab. [illegible] [illegible]): For these constitute the essence of the law itself; & are to be discovered, by ascertaining the cause, or motive, which ~~induced~~ led to the enactment of the law in question.

From this last rule results what is called the equity of a law; which has been defined to be "the correction of that, wherein the law, by reason of its universality, is deficient." But this definition, ~~re-mad~~ marked, as it is, with depth & comprehension of thought, appears to ~~imply~~ mean nothing more than ~~(is above expressed; viz)~~ that the equity of a law is a construction of it, agreeable to its reason & spirit: A mode of interpretation, which permits the letter of the law to be enlarged, or restrained, as the reason & spirit of it may require. — The principle of equitable, or, (as it is sometimes called), liberal, construction ~~almost~~ requires a somewhat detailed illustration — which will be attempted under the head of the Construction of Statutes; as these constitute that branch of the law, to which ~~this~~ the rule of equitable construction is principally applicable.

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Municipal Law is divided into kinds, or branches: 1. the Lex non scripta, the unwritten, or customary law; & 2. the Lex scripta, the written, or statute law. (1 Black. Com. 63.

Lex non scripta

I. The unwritten law includes, ~~not only~~, 1. the common law, properly so called, or the general customary law of the whole state, or kingdom — 2. particular customs, + — and 3. certain particular laws, observed only in particular courts, or jurisdictions (Id. 67. 68).

+ or ~~which~~ extend only through particular districts, or parts, of the state —

~~All~~ These three subdivisions of municipal law are styled "unwritten," because they are not originally established by written enactments, as ~~the~~ acts of the legislature are; but derive their authority ~~solely~~, from immemorial usage, which implies a general assent to their adoption, & gives them the force of laws (Id. 64. 67). And because, ~~they are~~ this authority is thus founded on usage, they are denominated customs, or customary laws.

I. ~~The~~ common law is a general (or customary law) system, extending throughout the whole realm, or state

I. The common law is a general custom, or rather ~~is~~ a great collection of customary rules, & doctrines ~~prevailing, & considered as a great body of such customs~~, extending, in general, over the whole realm, or state, though subject to such exceptions, as particular customs may have established, in particular districts, or parts of the state (Id. 68). For particular customs are in the nature of exceptions to the general law of the land; inasmuch as they constitute local rules, having the force of laws, but differing from the general law of the state.

The common law comprehends that great system of principles, or doctrines, by which almost all the civil rights & duties of all the subjects, or citizens, of the State, as well as those of the state towards its subjects, or citizens, are ascertained, & enforced. ~~But the common law, in all~~ But any part ~~a part~~, of the common law, (such only excepted, as may form a part of the fundamental, or constitutional, law of the state), is, at all times, liable to be altered, or abrogated, by the legislature.

The common law, & all other branches of the unwritten law, depends, for its authority, as has already been said, on immemorial usage – i.e. usage, that has prevailed, "time out of mind", or, in the more formal language of the law, "time, whereof the memory of man runneth not to the contrary." (Id. 67. 68. 2 Id. 31). But, by an arbitrary rule in the Law of England, the time of legal memory extends back to the accession of Richard the First to the English throne, (A.D. 1189); & therefore, any custom, or usage, which can be shown not to have existed, at the commencement of that monarch's reign, ~~has not the~~ cannot, ~~(according to this)~~ in legal theory, ~~have the~~ be obligatory – since it must have originated, within the time of legal memory, & consequently cannot be immemorial. (2 Id. 31). — ~~It is to be observed, however, that~~

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This rule, establishing the date of legal memory, from the accession of Richard the First, ~~is~~ was adopted, it seems, when the statute of Westminster I. in the third year of Edw. the First, established the æra of the former ~~misrule~~ of those monarchs, as the time of limitation, in the writ of right. (2 Black. Com. 31, n.) Qy, at the time of the passing of this statute, ~~to more than only about 80 years considerably less than 100 Con-~~ only about 80 years ~~tinuity~~, had elapsed, from the accession of Richard the First, & consequently, a custom, which ~~was~~ had existed through this latter period, was then deemed immemorial. In analogy, therefore, to the reason, or (if it may so be called) the principle of the rule, then adopted, the latter period would seem sufficient — so far as regards the necessary duration of a custom — to give it validity. (Vide Litt. §170. 2 Roll. Abr. 265, pl. 10.) But the rule, fixing the date of legal memory, as above stated, is now merely ~~altogether~~ theoretical, & indeed, a legal fiction — as will hereafter appear.

The common law being unwritten, the question will naturally arise, where is this branch of the municipal law to be found? For in an age of letters, it cannot be supposed to be preserved, ~~by the exercise~~ mainly by the ~~exercise~~ of human ~~memory~~ memory, or by the equally fallible means of oral tradition. The answer to the question, then, is, that the common law, or more correctly speaking, the ~~evidences~~ memorials of what it is, are to be found, in

the words of courts of justice ~~containing~~ approved in books of reports, containing the judicial decisions of such courts – & in the treatises of the learned in the Law (1 Black. Com. 64. 69. 71). From these sources of information, a knowledge of the common law is to be derived; & to ascertain & expound it, authoritatively, is the appropriate province of the judges of courts of justice (Id. 69), who are styled its authorities, & oracles.

But the memorials, or monuments, of the common law, mentioned in the last section, are only evidence of what the law is. They are not the law itself, or in other words, they do not constitute the law, but merely declare it. Whereas ~~(as will be hereinafter)~~ the enactment of a rule, by the legislature, creates & forms the rule, thus enacted. But that the records, or reports, of ~~judicial~~ upon points of the common law, judicial decisions, are only evidences of what the law is, appears, clearly from the fact, that such decisions have been, & still are, not unfrequently overruled, & declared to be not law – which could plainly never be done, if a judicial decision were, itself, the law. Still judicial decisions, emanating from the higher class of courts of justice, are the highest, most solemn, & most authoritative evidence, known to the law, of those principles, customs, rules & doctrines, which form the body of the common law. (Id.) And such decisions, though regarded, in theory, as mere evidence of the law, become, nevertheless, when strengthened & made, by subsequent adjudications, & long & general acquiescence – practically as authoritative, as legislative enactments, & as precedents of justice, according to the laws & usages of the State, are conclusive of the points, obliged to be adjudged in them.

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A precedent, in the legal acceptation of the term, ~~as the term is understood in law,~~ is a former judicial decision, on any ~~point question~~ point of law, afterwards coming in question; & is, therefore, ~~primâ facie~~ only evidence, primâ facie, of what the law is. But, like other primâ facie evidence, (~~it becomes conclusive, unless satisfactory reason can be shown against it~~) it casts the burden of proof upon the party, who objects to it; & is to be followed, when the same question again arises, unless ~~the~~ it can be shown to be manifestly absurd, or unjust — even though the reasons, on which it was founded, may not be apparent. (1 Black. Com. 69.70). Otherwise, the law would ~~must~~ remain forever uncertain; + since the decision of every legal question would, at all times, depend, entirely, upon the discretion of the individual judge, or court, to whom it might be submitted; and all civil rights, duties, & liabilities, would forever remain merely conjectural: An evil, hardly less to be deprecated, than the ~~utter total~~ utter absence of all law. — "Stare decisis," says Mr. Justice Buller, "is the most important maxim of the law." (1 East, 495).

+ and no uniform system of jurisprudence could ever be established:

The authority of precedents, as explained above, appertains ~~(obligation to abide by precedent, extends)~~ as well to the judicial constructions, ~~already given~~ which have before been given to ~~the~~ the statutes, or written law, of the state, as to the former adjudication of questions, arising under the common law; & for the same reasons. (~~In both cases, the precedent~~ In the former case, the precedent is as solemn & authentic an exposition of the written, as, in the latter it is, of the ~~unw~~ unwritten, law.

Precedents, however, are, in strictness, ~~decisive~~ authorities, so far only, as regards the precise questions, or points, ~~directly decided~~ which they directly decide. The incidental ~~& extrajudicial~~ ~~remarks~~, and extrajudicial opinions, ~~or collateral~~ or propositions, advanced ~~by the court~~, on collateral points of law, in the reasonings of the court, for the purpose of explaining & vindicating its decision, on the ~~precise~~ question, to be determined, form no part of the ~~precedent~~ decision, or judgment, itself, (which alone, is ~~is alone~~, the sentence of the law); and are, therefore, no part of the precedent.+ Hence, such collateral, or auxiliary remarks ~~of~~ are called *dicta*, ~~or~~ *obiter dicta*, or *gratis dicta* – terms intended to distinguish them from whatever forms a constituent part of, or is necessarily involved in, the *direct decision* of the court.

+ has much as they suppose not to have received the same solemn & deliberate consideration as is presumed to have been bestowed on the point, directly in question.

It is not to be inferred, however, from what has now been said, that these *dicta*, emanating from any of the superior tribunals of the state, are to be wholly disregarded. On the contrary, they generally ~~they~~ deserve, & receive the respectful consideration of succeeding judges; & in the absence of direct opposing ~~judicial~~ authority, ~~may often~~ sometimes ~~[illegible]~~ justly influence & govern subsequent decisions

The other source already mentioned, from which ~~the inquirer may acquire~~ a knowledge of the common law may be derived, is ~~[illegible]~~ to be found, ~~in legal treatises~~, ~~[illegible]~~ ~~composed by learned jurists~~ in the *works of learned jurists*, which compose a body of what is usually called text-law. But

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the treatises of such authors are not generally, & in strictness, authorities per se; & indeed possess no other binding force, than as they are found, or presumed, to be evidence of points, formerly decided, or, as they have been sanctioned, or approved of, by subsequent judicial decisions. The mere extra-judicial opinions, or speculations, of even learned & able jurists are, not originally, of intrinsic authority — because they are extra-judicial, & unofficial. Still however, works of this kind often are, useful auxiliaries to the Law-student, the counsellor & the judge; and such of them, as have long-established reputation, as standard works, are, in every day's experience, cited, as authorities, both at the bar, & on the bench. Such ancient Legal treatises also, as cannot plead a prescriptive sanction, from lapse of time, but which commend themselves to the approbation of the legal profession, are often deemed worthy of citation, on the points, of which they treat, though not originally regarded with the same veneration, or consistency, as the more ancient standard works, before alluded to.

(a) Of ancient works of this high class, Sir W. Blackstone enumerates, by way of selection, Glanvil, Bracton, Britton, Fleta, Fyngham, Littleton, Statham, Brooke, Fitzherbert, & Stamford, & Coke. To these names might be added Fleetwood, Lambard & Hoveden (1 Comm. 72-3.

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+(of which the chief portions have been generally adopted in this country)

After this very brief enumeration of the ~~[illegible]~~ sources, from which a knowledge of the common law, (or general customs) of England, may be obtained, it remains to consider, whence, or how, this branch of the municipal law, originates, or came into existence. And on this point, it seems sufficient, to say, that the great body of the English common law + has been, ~~at one time~~, in fact, framed ~~and the~~ ~~built up~~ & gradually built up, by the superior courts of justice, in that kingdom – in other words, by a long succession of the most upright & wise, illustrious men, of whom that land of great minds can boast. [And of the system of jurisprudence, thus erected, there ~~it~~ is believed to be no ~~more~~ exaggeration in saying, that it is, as a whole, the noblest monument of human wisdom ~~& distributive justice~~, that the world has ever witnessed.]

But ~~here the question will naturally occur, that~~, as courts of justice are not the *supreme*, or *legislative* power of the state, the question will naturally occur, how can a rule of civil conduct, ~~promulgated~~ prescribed, by the sole authority of these tribunals, be clothed with the authority of a *law* – which ~~is~~ has been already defined to a rule, prescribed, by the *supreme* power of the state? To this ~~inquiry~~ it may be replied, that, from the universal & long-continued prevalence of a customary ~~custom~~ rule, acting upon all

the citizens of a state, (~~necessarily or fairly implied, it is reasonably to infer that inferred~~) it is reasonably inferred, that ~~all~~ the people have given it their assent & approbation; and the ~~continued~~ long continued acquiescence of the legislature, in the existence ~~of~~ & continuance of the rule, may be regarded, as a tacit legislative confirmation of it. And thus the custom is considered, as having the virtual sanction of the supreme power. [Introduce, here s. (‡) p. 31.

§. It may still be asked, how the great body of the common law, in its present state, can be, in the legal sense of the term, immemorial; since many important parts, ~~of~~ & even some entire titles of it ~~a great party of (the system)~~ were, in fact, unknown, at the accession of Richard I. to the English throne. This difficulty in legal theory, arises from the (~~theoretical or~~) arbitrary & fictitious, date of legal memory (vide ante s.s.); & is theoretically obviated, by the consideration, that the great principles, which constitute the basis of the common law, are those of ~~eternal~~ natural & immutable justice, which are necessarily the same, at all times: whence it follows, that modern decisions, on points never before determined, are considered as evidence of what the law, as to those points, must originally, & immemorially have been. [This explanation, it is true, ~~extends~~ does not extend to the merely artificial & technical ~~rules~~ parts of the system; ~~which are to be found in the common law, as well as in most other sciences;~~ ~~but to those rules which establish the great boundaries of right & wrong,~~ ~~(& remedies)~~ ~~remedies & redress~~; these parts being, in a great measure, of positive institution, & only auxiliary to the enforcement of those fundamental principle

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It may be proper ~~here~~ to remark, that the establishment of a body of unwritten, or customary law ~~has been~~ is absolutely indispensable, ~~(both in England & this country)~~ to the due & regular administration of justice. ~~[For no judge would be able to enforce even the most simple provision even of statute law, without either availing himself of such rules of the unwritten law, as may apply the case in question, or creating such rules of his own, for the occasion]~~. For statute-law, being only ~~entirely~~ a miscellaneous collection of provisions, unconnected with each other, & in a great measure, of mere positive institution, cannot ~~be made to~~ reach only a very small part of those numberless cases & exigencies, to which the municipal law of every civilised state must extend: Whereas the common law ~~embraces~~ embodies a comprehensive, connected, & ~~systematic~~ methodised system of principles, extending to all duties of perfect obligation, as well as their corresponding rights (i.e. to all civil rights & duties) ~~&~~ forming, as to these, a system of ethics (0).

It is also important to be observed, that the Law of nations — or more precisely, that, which ~~has been~~ is

‡ is said to have greatly multiplied doubtful questions of law, & consequently to have much augmented litigation, in the kingdom of France.

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(0) In these remarks, I am by no means, to be understood, as presuming to decide, how far all unwritten law might be dispensed with ~~[illegible] State [illegible] be improved, by the experiment of~~ by what is called codification; which, as I understand the term, means a transformation of the entire body of the municipal law into a code of written law. Criminal law, or that branch of the municipal law, which relates to crimes & punishments, appears to offer the most favourable subject for the ~~attempt~~ experiment; as that branch of the law is founded on principles, both fewer, & more simple, than those, which regard private rights & wrongs. But such an undertaking, if extended to all branches of the law, would certainly ~~appear~~ appear to present great difficulties. Even the Code Napoleon (‡ ~~may~~)

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termed, indifferently, the natural, necessary, or internal, as distinguished from the conventional law of nations (Vatt. L. N. Prelim. S. 7), forms a part of the common law; † it is, indeed, incorporated with the municipal law of every state, professing to be bound, by international law. (7). But the conventional law of nations — by which we are to understand that, which is founded on treaty, or international compacts — is obligatory on those states only, that are parties to such compact. (Vatt. L. N. Prelim. S. S. 24. 25)

† 4 Black. Com. 67. 2 Term. R. 192. 230. Park. Ins. 353).

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(7) By the natural, necessary, or internal law of nations, is meant that law, which is prescribed to nation, by the law of nature. This law is therefore, as universal & immutable, as the principles of natural justice & right reason; & no nation can violate it, without a violation of natural duty.

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II. The second branch of the municipal law of England consists of particular customs, or local usages, which have the authority of laws only in certain particular districts, ~~only~~ or parts of the realm, or state; but are of no force beyond those limits (1 Black. Com. 74. 2 Id. 263). Such local ~~usages~~ laws, prevail in various English counties, cities, towns, boroughs & manors (1 Id. 74); & probably abound, as well in most other European countries, as in England. They form, as has already been observed, exceptions to the general law of the land; & are usually regarded, & cherished, whenever they prevail, as privileges, or immunities, not enjoyed by the subjects, or citizens, of the state at large.

This branch of the municipal law of England has been produced, in a great measure, by causes, which can have scarcely existed, in the United States. When all the petty kingdoms, into which England was anciently divided, were brought under one common, consolidated dominion, the subjects of each of the several minor sovereignties were generally permitted to retain within their respective limits, a part of their former peculiar laws & institutions. And in like manner, when particular provinces, cities, or other districts of country, in different kingdoms of continental Europe, have passed from one dominion to another either by conquest, or voluntary cession, the subjects, thus transferred to a new sovereignty have, in many instances, been allowed to preserve & perpetuate, to some extent, their original & peculiar customs & laws. In such cases, the original laws & institutions, thus retained, have become what we called, in the English law particular customs

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In a multitude of ~~other~~ other cases, particular customs prevail, for which no ~~other~~ original cause can be assigned, than their actual & long-continued existence. Many of these probably originated in mere usurpation, or the unauthorized assumption of ~~rights~~ powers, or immunities, not confirmed by the sovereign power; but which, ~~by~~ remaining long unquestioned, & ~~thus~~ tacitly acquiesced in, acquired, at length, the sanction of prescription, & the authority of laws.

As particular customs form no part of the ~~general~~ common, or general law of the land, they are not presumed to be known, judicially, to the judges of courts of justice. Indeed, no judge can, ex officio, take notice of ~~them. For their existence~~ of such a custom: For its existence is not matter of law, but of fact, & must, therefore, be established, like any ~~other~~ ordinary fact. Litt. §. 265. Co. Litt. 175. 1 Black. Com. 76.

Whenever, therefore, a particular custom is to be made a ground of demand, or defence, in any suit it must be specially set out, or recited, in the pleadings, which must ~~allege~~ state both the custom itself, & that the thing or case in question, is within it's duty. And, unless the same custom has been before tried, determined, & recorded, in the same court, in which the question is depending, its existence, if denied, must be tried by the jury. Doug. 305. 1 Black. Com. 76.

~~To render a particular custom valid & legal, it~~

To the validity, or legality, of a particular custom there are seven essential requisites, the absence of either which, or of any one of which, renders the custom itself void. These requisites are the following: 1. A particular custom, to be authoritative, must, like a general custom, be immemorial. ——— 2. It must have been immemorially continued, without interruption. But by this requisite, no more is meant, than that the right which the terms of the custom affords must have been uninterrupted; because (~~the revival after of the right~~) a revival of the custom, after such an interruption, ~~of the right~~, would be a new commencement of it; and the very fact, that this commencement is susceptible of proof, shows the custom to be not immemorial. Yet a temporary suspension of the exercise of the right does not ~~invalidate~~ destroy the custom. — 3. It must have been peaceable, & acquiesced in: For if it has been immemorially contested, that fact shows the want of that common consent, in which all such customs have their origin. — 4. It must be reasonable, or rather not unreasonable, in judgment of Law. But as far as regards this requisite, the custom will be held good, unless it shown to be against reason: For the burden of proof is upon him, who objects to the custom. — 5. It must be certain. Hence, if the right claimed under an alleged custom, depends on a fact too vague to be precisely ascertained, or to be made the subject of a regular issue, (as, if the rule of a particular custom be, that land shall descend to the most worthy of the owners kindred); the custom is void. — 6. It must

be compulsory: Otherwise it cannot constitute such a rule, as can be inforced; & is consequently destitute of the very first element of all municipal, or civil laws. Therefore, a custom, that all the inhabitants of a certain district shall contribute money, for any given object — as a road, or a bridge — at their own pleasure, or discretion is nugatory, & void. — 7. Different customs, existing in one & the same place, or extending throughout the same limits, must be consistent with each other. If, therefore two customs, proved thus to ~~co-exist~~ co-exist, de facto, are repugnant to each other; they are both void. For, being both of equal antiquity, no superiority can be assigned to either; & ~~they~~ by necessary consequence, they reciprocally destroy each other (Co. Litt. 113. 114. 1 Roll. Abr. 565. 9 Co. 58. 1 Black. Com. 76–8.) Litt. § 212.

Particular customs, which derogate from the common law, (i.e. which ~~are~~ are repugnant to the general customary law of the state), must be construed strictly. ~~A~~ A particular ~~thing~~ cannot, then, be extended, by construction, to cases in pari materiâ, as, ~~being~~ falling within the same reason, as those ~~cases which i~~ expressly embraced by the custom; but must be confined, in its effect, to such cases, as are within the letter, or express terms of it. (1 Black. Com. 78–9.) (8)

~~The subject of particular customs I have, intentionally, treated with all practicable brevity.~~

8. In treating of particular customs, I have been, intentionally, very brief; as I am not aware, that the subject can be of much practical importance, in the United States. Nothing more, therefore, than a very general epitome of this branch of the unwritten law of England has been here attempted;

+ A more particular explanation, & illustration of it may be found, in the summary that has been given.

Sir William Blackstone, in his invaluable Commentaries has classed the lex mercatoria, or Law merchant, among particular customs (1 Black. Com. 75). But this classification is manifestly incorrect. The custom of merchants, which forms this branch of the municipal law, is not, like a particular custom, confined to any particular place, or to any local limits; but extends, like all branches of the common law, throughout the whole realm, & to all classes of persons. Indeed, as regards local limits, it is more extended, in its operation, than any part of the mere municipal law of any state, or country; for it is a branch of public law, and as such, has become incorporated with the common, or general law of all civilized nations (Marsh. Ins. 16. 19).

The law merchant, then, constitutes a part of the common law, both of England & of the United States: And although it is limited, in its operation, to certain particular transactions, & concerns; so also is every other individual branch of the common law. Hence it need not, like particular customs, be specially pleaded (1 Salk. 125); because all people are presumed to know it, judicially, & are bound, judicially to take notice of it, as a part of the general law of the land. For the same reason, it is not, like a particular custom, to be tried by jury

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not proved by witnesses, except in new cases, in which the custom of merchants, on the point in question, is not known to the court. In this last particular, ~~not in this city, the custom of merchants~~ the law-merchant does indeed, partake of the character of a particular custom; but, with this very limited ~~(exception)~~ exception, it has ~~all~~ the same essential properties & incidents as any other branch of the common law (2 Burr. 1216, 1222. 1 W. Black. R. 295. Doug. 72-3. 653. 3 Burr. 1669. 4 Term R. 338. Chit. on Bills, 15, 2d. ed. 19.

III. The third branch of the unwritten municipal law consists of certain particular laws, (or ~~local customs~~ bodies of law) existing under certain restrictions, in England & to some extent, in this country, by ancient custom, & enforced only in certain courts & jurisdictions (1 Black. Com. 67. 79. 83. 82-3). The laws, thus designated, ~~are part of the Roman empire, embracing about~~ chiefly consist of what are called the civil & canon laws (Id. 79).

The civil law (or Corpus Juris Civilis of the Roman empire), ~~of the Romans~~, which constitutes the principal foundation of the unwritten ~~law~~ municipal law of several of the states of continental Europe, is, with certain restrictions, adopted in ~~each~~ England, by four different ~~courts~~ species of courts, viz. the Ecclesiastical courts - 2. the military courts - 3. the courts of admiralty - and 4. the courts of the two ancient universities. The same courts have

also adopted, to some extent, the canon law; which is a system of Roman ecclesiastical jurisprudence, established by the authority of successive Popes, & general councils of the Romish communion, & of the opinions of the ancient Latin Fathers of the church. But neither the canon, nor the civil, law has been, as a body, or system, of jurisprudence, adopted, by the English common law courts; though it must be admitted, that the ~~principles~~ elements, of the ~~universal~~ common law of England, as well as of the municipal law of most of the Christian nations of modern Europe, have been, to no small extent ~~proved to a great measure~~, derived from the civil law of the Roman empire, as collected & digested, under the supervision & sanction, of the emperor Justinian (1 Black. Com. 83).

The civil law is also, in some degree, interwoven with our own municipal law - especially with those parts of it, which appertain to equity, & admiralty jurisdiction, or ~~to that~~ which relate to the Probate of wills, & the administration of the effects of intestates.

The civil & canon law, though forming a body of written law, in the jurisprudence of imperial & papal Rome - are both, in England, & the United States, (so far as they are adopted in either country) on a par with the unwritten laws. Because they are, in their authority, ~~not~~ as unwritten, as in England, not to any written enactment, or express legislative sanction; but to their adoption, recognition, by immemorial, & ancient usage, in particular cases, & certain particular courts (Hale, H. C. L. c. 2.; Black. Com. 79).

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Such parts of the English law, unwritten, or written, as ~~are in~~ have the authority of law in the United States, ~~and~~ generally owe their authority here, to a similar sanction. For neither the English, nor any other foreign, law is, ~~law in these states~~ as such, of any intrinsic force, in any of these States: since no sovereign state can be under any natural obligation to derive its jurisprudence, from any other sovereignty. So far, therefore, as the English law, or any part of it, has become our own, it has become so, by voluntary adoption, either in our courts of justice, or ~~by legislation~~ our legislatures. But ~~from this~~ here arises this distinction: Such parts of the English law as have been received & adopted, ~~in our courts, only~~ (as has most commonly been the case), by the authority of our courts, form a part of our municipal or common law; whereas those parts, that have been re-enacted, by our legislatures, constitute a part of our written, or statute law.

And as those colonies, ~~before the time of the American revolution, which, by the events of the war, became independent states~~ which, by the events of the American revolution, became independent states, were peopled, chiefly, by emigrants from England & her dependencies; they naturally adopted, both as colonies, & as foreign states (though with some qualifications & exceptions), the great principles of the English jurisprudence, & especially the customary law of the realm of England, as their own. But as each of these states has its own peculiar laws & institutions, which have been established, & moulded, according to its own

views of right & expediency, & independently of the control, or concurrence, of any of its sister States; it has resulted, as a natural, & almost necessary, consequence, that elements of the english law have been ~~inforced & embodied~~ incorporated with the municipal jurisprudence of the several States of the American Union, in ~~degrees~~ somewhat different ~~degrees~~ proportions. But, to point out, & distinguish, those different proportions, with any thing like an approximation to accuracy, would be a task, ~~of no small difficulty~~ not only laborious & difficult, but ~~altogether~~ extending far beyond the scope of the present treatise.

As however, the jurisprudence both of the colonies & the States has, by common consent, been ~~formed after~~ modelled, in almost all respects, after ~~after~~ that of England; ~~(it seems correct to say)~~ & as the judicial tribunals of our country have, generally, adopted & followed the decisions of the english superior courts, as precedents, proper to be followed, how; it seems correct to say, ~~that so much of the English common law, as has not been already rejected (only)~~ that the great body of the english common law, (with the exception of such portion of it, as have ~~not~~ been already rejected by us, & of such also, as ~~we do not~~ can have no application to our condition, government, or institutions), ~~is~~ is, prima facie, to be ~~deemed~~ taken, as a part of ~~our own~~ the municipal laws of these States (g); ~~& this, I suppose, does not~~

(g). This observation does not apply to the State of Louisiana

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to be rejected, by our courts, unless it can be shown to be absurd, or unreasonable (1 Black. Com. Tucker's ed. 380-4. 390-3. ~~may be extended to a certain~~

The same remark may be extended to ~~the~~ a certain portion of the statute-law of England. For it seems generally agreed, that the original colonists, who commence settlements, in new regions, regularly carry with them, as ~~their~~ a birthright, so ~~so much of~~ much, of the law, (written & unwritten), of the parent country, as is extant, at the time of their migration, & applicable to their new civil condition & circumstances (~~1 Black. Com. Tucker's ed. 411-412~~ (2 P. Will. 75. 1 Salk. 411. Cowp. 204. 1 Black. Com. 106-8. Id. Tucker's ed. 380-4. 390-3. Kirb. 69).

~~According to this principle, which appears to have been recognised, to a great extent, in the judicial tribunals of our country,~~

If this principle, which appears to have been recognised, in this country, to ~~the~~ a considerable extent, is admitted to be correct; it must follow that that portion, of the English statute-law, which was in force in, that ~~that the~~ kingdom, when any of these states were first colonised, ~~from~~ by English subjects, is now binding, in such states, ~~law~~, to the same extent, as ~~a~~ the English common ~~law~~ law. All such English statutes, however, as have been since enacted, are, ~~on~~ to ~~all~~ the same states, mere, confessedly, foreign laws. But no such distinction, between old & new, or ancient & modern rules, can be applied to the common law, of which all the parts are deemed equally + ancient: the decision of every new question being evidence of what the law, on that point, has immemorially been.

But to whatever extent, the written or unwritten law of England may have been adopted, in any of these states, its authority is, unquestionably, subject at all times, to the will of the sovereign power, in such states, respectively,

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& these, of course, to be abrogated, or rejected, in part, or in whole, by their several legislatures. Yet, as the English common law, at least, has been so generally recognized, & adopted, as a part of the municipal law of most of these states; our courts of justice, I conceive, are not now at liberty to reject its principles, except under the limitation, or restriction, already expressed — i.e. unless they can be shown to be absurd, unjust, or inapplicable to our situation. For these principles have long been considered, by the people of our country, as the rule of their civil conduct & as defining the measure of their civil rights & duties. (~~& they have therefore embodied their civil code, with reference to it.~~ 1 Black. Com. Tucker's ed. ubi infra.) that our civil concerns have been, to most intents, conducted & regulated with immediate reference to them, as the established principles of our own law (1 Black. Com. Tucker's ed. ubi infra)

Not long after the establishment of our present national government, it was formally made a question, ~~discussed at large~~, before the Circuit Court of the United States, for the district of Connecticut whether it was possible, for any one of these states, to have a customary law of its own, differing from the common law of England. This question was raised, on a point on which the courts of the state of Connecticut had long, & intentionally, rejected a rule of the English common law, & substituted a different one. And the objection to the latter rule was, made at the bar, that it was not immemorial, & consequently could not

be taken,) inasmuch as it was first introduced within the time of legal memory - i.e. long since the accession of Richard I. to the English throne (ante S.) The court, however found no difficulty, in recognising the authority of the rule established by the courts of the State. It may, indeed, excite some surprise, that such a point should ever have been raised, when it is considered that it was by the sole authority of those courts, that any part of the English common law had ever been originally adopted in the State, or indeed, that any system of ~~common~~ customary law had ever existed, in it. It is also specially worthy of observation, that the English rule, fixing the date of legal memory, is not only altogether arbitrary, & fictitious, (ante S.), but absolutely incapable of application to any of the United States, since none of them existed, until after the lapse of centuries, from the reign of Richard I.

II. The written law of the second great branch of municipal law, consists of the ~~sole~~ legislative acts, or statutes, passed by the legislature (1 Co. 29). These are denominated written laws, because their original institution, or establishment, is in writing; and form the statutes of the state, taken collectively, constitute the body of its written law. (1 Blackstone 85).

Statutes are of several different kinds, which are distinguished from each other by designations, ~~derived from~~ expressive of their respective ~~characteristics~~ natures, or principal qualities. Thus

1. Statutes are either general, or special, i.e. public, or private. A general, or public, statute is one, prescribing a universal rule, which regards the whole community, or state. Such a statute is, thereby, like the common law, a part of the general law of the land, of which the courts of justice, in the state, are ex officio presumed to know, & bound to take notice of, although it be not, (as indeed, it never need be), specially pleaded, or set forth, by the party, entitled to the benefit of it. (1 Blackst. Com. 86).

A special, or private, statute is one, which regards only particular individuals, or private concerns; & like particular customs, are in the nature of exceptions to the general law of the state, (as, for example, an act, creating a private corporation, or authorizing the sale of the lands of an infant). ~~Private~~ Special statutes must, therefore,

in general, be pleaded & proved by ~~him~~ those, who would found any legal claim, or defence, upon them: Since courts of justice can take no ~~judicial~~ notice, judicially, of any other, than the general public law of the land (Sa. 4 Co. 76. Cro. Jac. 139. 1 Saund. 193. 2 East. 341. 1 Stra. 187. Doug. 378. 380. n.)

The above distinction between public & private statutes, though expressed in plain & intelligible language, is still, in its ~~actual~~ practical application, not always obvious, or easily settled. Most public statutes do, indeed, ~~in~~ directly & ~~immediately~~ ~~contract~~ , literally, regard the whole community, or the concerns of all the members of the state, without distinction.+ Of this ~~description~~ kind are such statutes, as those of usury — of frauds & perjuries — of distributions — of limitations of actions — & of almost all others, which are held to be public acts.

+ But as regards enactments of this description, there can hardly arise any difficulty, or doubt, in determining to which ~~class~~ of these two classes of statutes they belong.

But, in some cases, statutes, relating, immediately, & in their terms, to only a part of the community, are, nevertheless, universally held to be public; while others, answering precisely the same general description, are confessedly private. And, to distinguish, correctly, between the one & the other class, in cases of this kind, has sometimes been found to be an undertaking of no inconsiderable difficulty. But, to obviate this difficulty, ~~the~~ law ~~has~~ furnishes a ~~criterion~~ rule of discrimination, as definite, & plain, as the nature of the case admits, viz.

If the class of persons, to whom a statute, in its terms, exclusively relates, amounts to ~~a species~~ what is called, in science, a genus, (i.e. a class, comprehending, & divisible into, subordinate classes, or species, of persons); the statute is public: But if the class, named in the statute, ~~constitutes~~ & to which, alone, its provision relate, constitutes only a species, (i.e. a class, which can be divided only into ~~individuals~~ individuals, & not into different classes); the statute, is generally, private. Thus, a statute, relating to all persons, who practise any ~~art~~ mechanical art, is public; because the class of persons, who practise such arts, may be divided into distinct subordinate classes — such, for example, as those of blacksmiths, shoemakers, coachmen, & many others: But a statute, ~~relating, consequently only, of which are limited to~~ relating exclusively, to one particular class of mechanics ~~or members~~ ex. gr. to all carpenters, or all masons, or all tailors, is, generally speaking, private; because the class to which the provision of the statute are confined, cannot be so divided into different classes. Again, a statute, respecting all persons qualified to serve legal process, is public; but a statute, ~~respecting~~ concerning ~~the qualification~~ all sheriffs, or all constables, is private. A fortiori a statute, concerning one or more private individuals, is private (4 Co. 76. a. b. 2 Saund. 154. 1 Lev. 86. Powd. 85. 1 Ld. Ray. 120. 381. Bac. Ab. Stat. F.

In England, every statute, which concerns the king, is public; since he is the head of the body politic, of the state, & an integral branch of the constitution, (4 Co. 77. 8 Id. 26. 3 Hob. 227. 1 Sid. 203. Bac. Ab. Stat. F.) Even in the

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same principle a statute, relating to the president of the United States, or to the governor of any of the states of our American Union, seems to be public.

So also, for the reason last mentioned, a statute, giving a forfeiture to the king, ~~of the state~~, is held to be public, even though it relate only to ~~(illegible)~~ a class of persons, amounting to no more than a species, 1 Kim. 429 Bac. Abr. Stat. F). It is therefore to be presumed, that a similar statute here, allotting a penalty to a state, would be held to be a public act. For the same reason, a statute, which concerns the public revenue, is public - e.g. a statute imposing a tax, to the state, upon all carpenters, or any particular class of mechanics, 10 Co. 57. Plowd. 65. 2 Mod. 249, 253. Bac. Abr. Stat. F.

A statute may be partly public, & in part private - i.e. some of its provisions may be, in their nature, of a public, & others, of a private, character

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Misericord - Eccles. 8.6. - La
Lam. 3.19.
Whirlw. Prov. 1.27.
Isa. 5.28.
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Water. Rev. 22.17